

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCELINO GARIBAY-GOMEZ,

Defendant.

No. CR99-4007-MWB

**ORDER REGARDING
DEFENDANT'S MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE**

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I. INTRODUCTION AND FACTUAL BACKGROUND

On February 19, 1999, an indictment was returned against defendant Marcelino Garibay-Gomez, charging him with possessing with intent to distribute approximately 897.9 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Defendant Garibay-Gomez entered a plea of guilty to the charge and he was sentenced to 240 months imprisonment. Defendant Garibay-Gomez appealed his conviction and sentence. On direct appeal, Garibay-Gomez argued that: (1) he did not admit at his plea hearing to possessing the quantity of methamphetamine later proved by a preponderance of the evidence at the sentencing hearing, and so he was improperly sentenced to the 240-month mandatory minimum; (2) the court failed in its obligation to fully inform him of his rights, as required by Federal Rule of Criminal Procedure 11(c) and therefore his guilty plea was invalid. The Eighth Circuit Court of Appeals affirmed defendant Garibay-Gomez's conviction and sentence. *See United States v. Garibay-Gomez*, 221 F.3d 1344, 2000 WL 823358 (8th Cir. 2000). Defendant Garibay-Gomez then filed his current motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Garibay-Gomez challenges the validity of his sentence and conviction on the following grounds: (1) that his Sixth Amendment right to a speedy trial was violated; (2) that the court incorrectly departed upward in sentencing him without first providing him with notice of its intent to possibly depart upward; (3) that his sentence is unconstitutional in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (4) that the government failed to establish the amount of methamphetamine attributed to him at sentencing; and (5) that he was denied effective assistance of counsel.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as “the statutory analogue of habeas corpus for persons in federal custody.” *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

[Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was ‘imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.’

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather “[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.” *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant’s ability to raise that issue for the first time in a § 2255 motion. *Dejan v. United States*, 208 F.3d 682, 685 (8th Cir. 2000); *Swedzinski v. United States*, 160 F.3d 498, 500 (8th Cir. 1998); *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or

through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant “‘can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.’” *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); see also *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

1. Speedy trial

Defendant Garibay-Gomez contends that his Sixth Amendment right to a speedy trial was violated by delays in this case. Defendant Garibay-Gomez, however, did not raise this issue on direct appeal and does not contend that the failure to raise this issue was due to ineffective assistance of counsel. Issues that could have been, but were not, raised on direct appeal are waived and cannot be asserted for the first time in a collateral § 2255 action absent a showing of cause and actual prejudice, or a showing of actual innocence. See *United States v. Frady*, 456 U.S. 152, 167-68 (1982); *Dejan*, 208 F.3d at 685; *Swedzinski*, 160 F.3d at 500; *Matthews*, 114 F.3d at 113; *Bousley*, 97 F.3d at 287. Thus, the court concludes that defendant Garibay-Gomez speedy trial claim was not appropriately raised in a § 2255 motion because it could have been raised on direct appeal and was not. See *Frady*, 456 U.S. at 167-68. Therefore, this part of defendant Garibay-Gomez’s motion is denied.

2. Upward departure

Defendant Garibay-Gomez also contends that the court departed upward in sentencing him without first providing him with notice of its intent to possibly depart

upward. Again, defendant Garibay-Gomez did not raise this issue on direct appeal and does not contend that the failure to raise this issue was due to ineffective assistance of counsel. Thus, the court concludes that defendant Garibay-Gomez's wrongful upward departure claim was not appropriately raised in a § 2255 motion because it could have been raised on direct appeal and was not. *See Frady*, 456 U.S. at 167-68. Therefore, this part of defendant Garibay-Gomez's motion is denied on the ground that it has been procedurally defaulted. Alternatively, the court finds that even if it were to find that this issue was not procedurally defaulted, the issue is without merit because the court did not grant an upward departure in this case but rather sentenced defendant Garibay-Gomez to the mandatory minimum sentence of 240 months.¹

3. *Applicability of the Apprendi decision*

Defendant Garibay-Gomez also claims that his sentence was incorrect because of the operation of the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Garibay-Gomez asserts that enhancement provisions of the Sentencing Guidelines are invalid in light of *Apprendi*. Review of this issue is precluded by the Eighth Circuit Court of Appeals's conclusion that the *Apprendi* decision presents a new rule of constitutional law that is not of "watershed" magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review. *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir.), *cert. denied*, 537 U.S. 900 (2002); *Sexton v. Kemna*, 278 F.3d 808, 814 n.5 (8th Cir. 2002), *cert. denied*, 537 U.S. 1150 (2003); *Murphy v. United States*, 268 F.3d

¹The mandatory minimum sentence could hardly have come as a surprise to defendant Garibay-Gomez. At the time of his guilty plea he was informed by the court that based on the amount of drugs alleged in the indictment and defendant Garibay-Gomez's criminal history, he faced a minimum mandatory sentence of 20 years imprisonment. Plea Tr. at 9. Moreover, the government filed a timely notice of its intention to seek an enhanced penalty against defendant Garibay-Gomez.

599, 600 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002); *Jarrett v. United States*, 266 F.3d 789, 791 (8th Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Dukes*, 255 F.3d 912, 913 (8th Cir. 8th Cir. 2001), *cert. denied*, 534 U.S. 1150 (2002); *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002). This view of the *Apprendi* decision has also been adopted by a clear majority of the other federal courts of appeals. *See, e.g., Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir.), *cert. denied*, 537 U.S. 1096 (2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). Therefore, the court is unable to reach the merits of Garibay-Gomez's claim.

4. Drug quantity

Defendant Garibay-Gomez further contends that the government failed to establish the amount of methamphetamine attributed to him at sentencing. Again, defendant Garibay-Gomez did not raise this issue on direct appeal and does not contend that the failure to raise this issue was due to ineffective assistance of counsel. Thus, the court concludes that defendant Garibay-Gomez's claim that the drug quantity attributed to him was not sufficiently established by the government was not appropriately raised in a § 2255 motion because it could have been raised on direct appeal and was not. *See Frady*, 456 U.S. at 167-68. Therefore, this part of defendant Garibay-Gomez's motion is denied on the ground that it has been procedurally defaulted.

5. *Ineffective assistance of counsel claims*

Defendant Garibay-Gomez also asserts claims of ineffective assistance of counsel. Defendant Garibay-Gomez asserts that his counsel was ineffective in the following respects: (1) that his counsel failed to adequately cross-examine witnesses at his sentencing; (2) that his counsel failed to present favorable evidence at his sentencing; (3) that his counsel's arguments at his sentencing were ineffectual; and (4) that his counsel failed to adequately pursue a motion to suppress on defendant Garibay-Gomez's behalf.

All of the claims of ineffective assistance of counsel Garibay-Gomez has presented in his § 2255 motion were not raised on direct appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687; *Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the

deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. Indeed, “counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel.” *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; see *Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .”) (citing *Strickland*). With respect to the “strong presumption” afforded to counsel's performance, the Supreme Court specifically stated:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* The court need not address whether counsel’s performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing “[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness.”). The Supreme Court has stated that “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

Here, the court is compelled to conclude that defendant Garibay-Gomez has not demonstrated that he was prejudiced by his counsel’s alleged errors, either individually or in aggregate, and therefore cannot demonstrate ineffective assistance of counsel. For example, although defendant Garibay-Gomez contends that his counsel failed to adequately cross-examine witnesses at his sentencing, Garibay-Gomez does not show any prejudice from his trial counsel's failure. Although Garibay-Gomez intimates that a stronger cross-examination would have aided his case, Garibay-Gomez fails to show how the outcome of trial would have been different if he had the benefit of a more extensive cross-examination of the government’s witnesses. The same flaw is seen in Garibay-Gomez’s claims that his counsel was ineffective because his counsel failed to present “favorable” evidence at his

sentencing and that his counsel's arguments were ineffectual. Defendant Garibay-Gomez does not disclose the evidence or the arguments that he claims should have been presented let alone establish that had this evidence or these arguments been presented that there was a reasonable probability that the outcome of sentencing would have been any different. Likewise, with respect to his claim that his counsel failed to adequately pursue a motion to suppress, defendant Garibay-Gomez does not disclose a legal basis for such a motion that was likely to prevail. The court notes that while Garibay-Gomez's co-defendant did file a motion to suppress, that motion was denied. Therefore, this part of defendant Garibay-Gomez's motion is also denied.

C. Certificate Of Appealability

Defendant Garibay-Gomez must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. See *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that Garibay-Gomez has

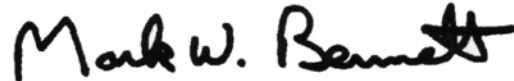
failed to make a substantial showing of the denial of a constitutional right, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Garibay-Gomez's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Garibay-Gomez's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that Garibay-Gomez has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 29th day of September, 2004.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive, slightly stylized font. The "M" is large and loops around the "a". The "B" is also large and loops around the "e". The "t" has a long, sweeping tail.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA